# PUBLIC CHARGE UPDATE
# What Advocates Need to Know Now

MARCH 26, 2020*

The "public charge" inadmissibility test has been part of federal immigration law for more than a hundred years. It is designed to identify people who may depend on government benefits as their main source of support in the future. If an immigration or consular official determines that someone is likely to become a "public charge," the government can deny that person's application for admission to the United States or refuse an application for lawful permanent resident (LPR or "green card") status. The Trump administration has issued regulations that change the meaning and application of the public charge grounds of inadmissibility for immigrants inside and outside the U.S.

Public charge regulations published by the U.S. Department of Homeland Security (DHS) and the U.S. State Department went into effect on February 24, 2020. Applications for visas and LPR status processed at U.S. embassies and consular offices outside the U.S. will be adjudicated under the new State Department regulations as of that date, including pending applications that were previously submitted. Applications for admission and LPR status that are processed by U.S. Citizenship and Immigration Services (USCIS) in the U.S. will be adjudicated under the new DHS regulations if they are postmarked or submitted electronically on or after February 24, 2020. The two agencies' regulations essentially mirror each other, applying virtually identical definitions and standards. Litigation challenging both sets of regulations continues, and they may again be halted by the courts.

## Important note about the effective date of the DHS regulations

**USCIS has not updated the regulations' *effective date* on its application and other forms,** including the Form I-944, Declaration of Self-Sufficiency.[1] Instead, on its webpage for Form I-944, USCIS provides "special instructions" that people filling out the form should **"read all references to Oct. 15, 2019, as though they refer to Feb. 24, 2020"**:[2]

> The form instructions for Form I-944 require the applicant to report and submit information about whether the alien applied for, was certified or approved to receive, or received certain non-cash public benefits on or after Oct. 15, 2019. See

[1] https://www.uscis.gov/forms/i-944.

[2] "Special Instructions," https://www.uscis.gov/forms/i-944.

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page 9 of the form instructions. Due to litigation-related delays in the final rule's implementation, USCIS is applying this requirement as though it refers to Feb. 24, 2020, rather than Oct. 15, 2019. In other words, aliens subject to the public charge ground of inadmissibility need not report the application, certification or approval to receive, or receipt of certain non-cash public benefits on the Form I-944 before Feb. 24, 2020. Please read all references to Oct. 15, 2019, as though they refer to Feb. 24, 2020.

The State Department's DS-5540, Public Charge Questionnaire,[3] correctly asks about benefits received after February 24, 2020. The Foreign Affairs Manual,[4] the State Department's policy manual, also has been updated with the February 24 date.

The Protecting Immigrant Families (PIF) Campaign, of which NILC is a founding member, is separately tracking potential changes to the public charge ground of deportability that may be proposed by the U.S. Department of Justice (DOJ).[5] The current test is extremely narrow and has been applied infrequently. You can sign up to receive updates from PIF on this and other issues,[6] including how to fight back if the DOJ publishes proposed regulations.

## Key Messages to Share

- The public charge inadmissibility test does not apply to all immigrants. There are many exemptions to DHS's and the State Department's rules.
- Most immigrants who are subject to public charge are not eligible for the benefits that count under the rule, and many benefits are not considered in the public charge assessment.
- We will continue to fight against the many attacks on immigrants and their families.

## Information on the public charge ground of inadmissibility

### To whom does "public charge" apply?

The "public charge inadmissibility test" affects people applying for admission to the U.S. or for lawful permanent resident (LPR) status. It does *not* apply to humanitarian immigrants such as refugees; asylees; survivors of domestic violence, trafficking and other serious crimes; special immigrant juveniles; and certain individuals paroled into the U.S. A complete list is set forth at 8 CFR § 212.23(a).[7]

[3] https://eforms.state.gov/Forms/ds5540.PDF.

[4] https://fam.state.gov/fam/09fam/09fam030208.html.

[5] https://protectingimmigrantfamilies.org/wp-content/uploads/2019/07/PIFdeportationFAQjuly.pdf.

[6] http://bit.ly/PIFCampaign.

[7] https://www.law.cornell.edu/cfr/text/8/212.23.

## Why are there two sets of regulations?

Decisions about applications for admission or LPR status made *outside the U.S.* (at embassies or consular offices abroad) are made by State Department officials. The State Department regulations affect people seeking immigrant and nonimmigrant visas and people seeking to be admitted to the U.S. as LPRs. The changes also affect applicants for LPR status who are required to leave the U.S. to seek LPR status through consular processing.

Decisions about applications for admission and adjustment to LPR status processed *inside the U.S.* are made by officials of U.S. Citizenship and Immigration Services, which is part of DHS.

## What do the regulations change?

The public charge inadmissibility test was designed to identify people who may depend on the government as their *primary* source of support in the future. If the government determines that a person is "likely at any time to become a public charge," it can deny that person admission to the U.S. or lawful permanent residence (or "green card" status). The immigration statute requires adjudicators to predict whether a person will become a public charge in the future based on their current characteristics, including their age, health, family status, income and resources, and skills and education. Immigration and Naturalization Act section 212(a)(4), 8 USC 1182(a)(4).[8] Analysis of these factors is called the "totality of circumstances" test.

The regulations issued by the Trump administration redefine a "public charge" as a noncitizen who receives one or more public benefits specified at 8 CFR § 212.21(b) for more than 12 months in the aggregate within any 36-month period.[9] The test counts the months of benefits-receipt so that receiving two benefits in one month is counted as two months of benefits.

The regulations add new standards and evidentiary requirements to the totality of circumstances test. These make it more difficult for low- and moderate-income people to have a successful outcome. The regulations treat each of the following (among other factors) *negatively* in public charge determinations:

- a household income below 125 percent of the U.S. federal poverty level (FPL)
- being a child or a senior
- having certain health conditions
- limited English ability
- having less than a high school education
- a poor credit history
- prior receipt of certain benefits

[8] https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title8-section1182&num=0&edition=prelim.

[9] 8 CFR § 212.21(b): https://ecfr.io/Title-08/pt8.1.212#se8.1.212_121.

The rule also expands the list of public assistance programs that may be considered as negative factors in a public charge determination, excluding anyone who is deemed more likely than not to use the enumerated cash, health care, nutrition, or housing programs in the future. More details are available in PIF's "Changes to Public Charge: Analysis and Frequently Asked Questions" (PDF).[10]

## What is happening in the courts?

Once the Trump administration published the final DHS regulations, states, counties and nonprofit organizations filed a total of nine legal challenges to the rule.[11] Several courts issued nationwide preliminary injunctions, legal orders that blocked DHS from implementing the regulations. The government asked courts of appeal to stay, or halt, these orders, and ultimately asked the Supreme Court to stay the last remaining nationwide injunctions. On January 27, 2020, the Supreme Court blocked the last nationwide preliminary injunctions that remained in effect, clearing the way for the regulations to go into effect everywhere but Illinois, where a court had issued an injunction that applied only there. The Supreme Court subsequently halted the Illinois order, allowing the DHS regulations to go into effect nationwide.

The Supreme Court's decisions addressed only whether the lower courts should have issued the injunctions. Legal challenges to both the DHS and State Department regulations are ongoing and could result in the regulations being placed on hold again.

Individuals who expect to apply for a visa or lawful permanent resident status should consult an immigration lawyer. To find help in your area, visit https://www.immigrationadvocates.org/nonprofit/legaldirectory/.

**MORE INFORMATION IS AVAILABLE AT**
**ProtectingImmigrantFamilies.org**

[10] https://www.nilc.org/wp-content/uploads/2020/03/Public-Charge-Analysis-and-FAQ-2020-02-24.pdf.

[11] https://docs.google.com/spreadsheets/u/1/d/e/2PACX-1vTIHxPL3tRDeRYEG3ORXRVZkk11MZRtkM-HszfAs7l8D02KO5T5T3qeM1j4lFvWEPRK2KAAY8uvd2Vj/pubhtml?widget=true&headers=false.